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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

UNITED STATES OF AMERICA and STATE OF CALIFORNIA, Plaintiffs, v. MONTROSE CHEMICAL CORP. OF CALIFORNIA, et al., Defendants. AND RELATED COUNTER, CROSS, AND THIRD PARTY ACTIONS.	NO. CV 90-3122-R [PROPOSED] PRE-TRIAL CONFERENCE ORDER Trial Date: October 3, 2000 Time: 9:00 a.m. Place: Courtroom 8

2357

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Following pretrial proceedings, pursuant to Rule 16, Fed..R. Civ. P. and Local Rule 9, IT IS ORDERED:

I. PARTIES AND PLEADINGS

The parties are:

A. Plaintiffs:

1. United States of America; and
2. State of California

B. Defendants:

3. Montrose Chemical Corporation of California ("Montrose");
4. Aventis CropScience USA, Inc. ("Aventis");
5. Chris-Craft Industries, Inc. ("Chris-Craft"); and
6. Atkemix Thirty-Seven, Inc.

Each of these parties has been served and has appeared. All other parties named in the pleadings have been dismissed by stipulation or by consent decrees that the Court has approved and entered and that are now on appeal in the Ninth Circuit.

C. The pleadings which raise the issues are:

1. Third Amended Complaint
2. First Amended Answer, Affirmative Defenses, Counterclaims and Crossclaims of Defendant Montrose Chemical Corporation of California to Third Amended Complaint, dated January 6, 2000
3. Answer of Defendants Atkemix Thirty-Seven, Inc., Stauffer Management Company, Zeneca Holdings, Inc., and Rhone-Poulenc AG Company Inc. to Third Amended Complaint, December 14, 1999
4. Answer of Defendant Chris-Craft Industries, Inc. to the Third Amended Complaint, dated December 17, 1999
5. Counterclaims of Defendant, Counterclaimant and Crossclaimant Montrose Chemical Corporation of California Against the State of California on behalf of Department of Fish and Game, State Lands Commission, and Department of Parks and

Recreation, the Department of Health Services, the California State Water Resources Control Board, the California Regional Water Control Board, Los Angeles Region, the California Air Resources Board and the South Coast Air Quality Management District dated September 30, 1991.

6. Answer, Defenses and Affirmative Defenses of Plaintiff and Counterdefendant, State of California on behalf of Department of Fish and Game, State Lands Commission, Department of Parks and Recreation, Department of Health Services, California State Water Resources Control Board, California Regional Water Control Board, Los Angeles Region, and California Air Resources Board, to the Counterclaims of Defendant and Counterclaimant Montrose Chemical Corporation of California dated April 30, 1992.

7. Chris-Craft Industries, Inc.'s First Amended Counterclaim Against the State of California, California Department of Fish and Game, California Department of Parks and Recreation, California State Lands Commission, California Environmental Protection Agency dated September 30, 1991.

8. Answer, Defenses and Affirmative Defenses of Counterdefendant, State of California on behalf of the Department of Fish and Game, State Lands Commission, Department of Parks and Recreation, and California Environmental Protection Agency to the First Amended Counterclaim of Defendant and Counterclaimant Chris-Craft Industries, Inc. dated April 30, 1992.

9. First Amended Counterclaims of Defendants and Counterclaimants Atkemix Thirty-Seven, Inc., Stauffer Management Company, ICI American Holdings and Rhone-Poulenc Basic Chemicals Company Against the State of California, the California Department of Fish and Game, the California State Lands Commission, the California Department of Parks and Recreation, the California Department of Health Services, the California State Water Resources Board and the Los Angeles Regional Water Quality Control Board dated September 30, 1991.

10. Answer, Defenses and Affirmative Defenses of Counterdefendants, State of California, and State of California on behalf of Department of Fish and Game, State

Lands Commission, Department of Parks and Recreation, Department of Health Services, California State Water Resources Control Board, and California Regional Water Quality Control Board, Los Angeles Region, to the First Amended Counterclaims of Defendants and Counterclaimants, Atkemix Thirty-Seven, Inc., Stauffer Management Company, ICI American Holdings, Inc., and Rhone-Poulenc Basic Chemicals Company dated April 30, 1992.

11. Counterclaims of Defendant, Counterclaimant, and Crossclaimant Montrose Chemical Corporation of California Against the United States, September 30, 1991;

12. Reply of the Counterdefendant United States To the Counterclaims of Montrose Chemical, November 21, 1991;

13. First Amended Counterclaims of Defendants and Counterclaimants Atemix Thirty-seven, Inc., Stauffer-Management Company, ICI American Holdings, Inc., and Rhone-Poulenc Basic Chemicals Company Against The United States, September 30, 1991;

14. Reply of the Counterdefendant United States To the Counterclaims of Atemix Thirty-seven, Inc., Stauffer-Management Company, ICI American Holdings, Inc., and Rhone-Poulenc Basic Chemicals Company, November 21, 1991;

15. Chris-Craft Industries Inc.'s First Amended Counterclaims Against The United States, September 30, 1991.

16. Reply of the Counterdefendant United States To the Counterclaims of Chris-Craft Industries Inc., November 21, 1991.

II. JURISDICTION

Federal jurisdiction and venue for the Plaintiffs' claims are invoked upon the grounds of Section 113(b) of CERCLA, 42 U.S.C. § 9613(b), and 28 U.S.C. §§ 1331(a) and 1345.

III. ESTIMATE OF TRIAL LENGTH

The Parties estimate that trial will last 30 to 35 days.

IV. NON-JURY TRIAL

The trial is to be a non-jury trial. On September 26, 2000 the parties shall submit to the Court and opposing counsel the findings of fact and conclusions of law the party expects the Court to make upon proof at the time of trial, as required by Local Rule 13.5.

V. THE FOLLOWING FACTS ARE ADMITTED AND REQUIRE NO PROOF:

The Parties will continue to identify matters upon which stipulations can be reached.

1. Defendant Montrose Chemical Corporation of California ("Montrose") was incorporated in 1946 as a Delaware corporation by two fifty percent shareholders.

2. From 1947-1982, Montrose produced the pesticide DDT at a plant located on an approximately 13 acre parcel located at 20201 South Normandie Avenue near Torrance, in an unincorporated part of Los Angeles County, California.

3. At all times since its formation, Montrose always has had two fifty percent shareholders.

4. One of the original fifty percent shareholders was Montrose Chemical Company ("Montrose-New Jersey"), which owned a chemical production plant in Newark, New Jersey.

5. In 1961, Montrose-New Jersey merged with Baldwin Rubber Company and a third company to form Baldwin-Montrose Chemical Company. In 1968, Baldwin-Montrose merged with Chris-Craft Industries, Inc., and the post-merger company retained the latter's name.

6. Montrose-New Jersey and Baldwin-Montrose each were, and Chris-Craft is, a Delaware corporation.

7. The other original fifty percent shareholder in Montrose was Stauffer Chemical Company.

8. As the result of a number of corporate acquisitions and related transactions, the first of which occurred in 1987, the corporate successor-in-interest to Stauffer is defendant Aventis CropScience USA, Inc., a New York corporation.

9. From 1947 until approximately 1987, Stauffer owned the Montrose plant site.

During the time Montrose produced DDT, Stauffer leased the site to Montrose. In connection with certain of the transactions alluded to in the preceding paragraph, ownership of the site was transferred to Atkemix Thirty-Seven, Inc., a Delaware corporation. Atkemix is the present owner of the site.

10. One of the chemicals used in the DDT production process employed by Montrose was monochlorobenzene, also known as MCB or chlorobenzene.

11. DDT and MCB are "hazardous substances" within the meaning of CERCLA, 42 U.S.C. § 9601(14).

12. From approximately 1953-1971, Montrose discharged process waters used in certain of its production processes to sewers that connected to the sewage system owned and operated by the Los Angeles County Sanitation District.

13. Montrose's wastewater discharges entered the LACSD system several miles from LACSD's sewage treatment plant at Carson, California known as the Joint Water Pollution Control Plant (or JWPCP).

14. At all relevant times, LACSD discharged wastewater from the JWPCP to the Pacific Ocean through the White's Point Outfall, located on the submerged lands at approximately sixty meters below the ocean surface.

15. The State of California issued a permit authorizing the construction of the White's Point Outfall before it commenced operations.

16. The outfall, which first commenced operation in 1937, has been modified and expanded on several occasions.

17. The outfall is located on submerged lands that lie completely within the three-mile limit from the shoreline.

18. Montrose closed the connection between its process wastewaters and the LACSD system in approximately 1971. From then until 1982, when Montrose stopped producing DDT, it relied on a water recycling system.

19. Beginning in 1982, Montrose dismantled all the buildings and equipment at the plant site. By 1985, the site was paved over with asphalt.

20. The Southern California Bight is a portion of the Pacific Ocean ranging from Point Conception in the north to the Mexican border.

21. The Palos Verdes Shelf consists of the submerged lands that extend seaward from the shoreline between Point Fermin and Point Vicente, and is approximately 1.5 to 4 kilometers wide and approximately 12 kilometers in length. The seaward terminus of the Shelf occurs at approximately 70 to 100 meters water depth, where the bottom slope increases, from 2-4 degrees to greater than 10 degrees. The area immediately seaward of the Shelf is known as the Palos Verdes Slope.

22. The Palos Verdes Shelf is located on submerged lands that lie within the three-mile limit from the shoreline.

23. DDT breaks down in the environment to various metabolites, including DDE, DDD and DDMU. DDE is the predominant metabolite of DDT present on the Shelf.

24. The Channel Islands offshore of California and Mexico include the following: Anacapa, Santa Cruz, Santa Rosa, San Miguel, Santa Catalina, San Nicholas, San Clemente, Santa Barbara and Los Coronados (Mexico).

25. The Northern Channel Islands include: Anacapa, Santa Cruz, Santa Rosa, and San Miguel.

26. There is a population of peregrine falcons on the Northern Channel Islands. Some peregrine falcons released on Catalina Island have migrated to other locations.

27. There is a population of Bald Eagles on Catalina Island. Additional bald eagles re-introduced there have migrated to other locations.

VI. THE FOLLOWING FACTS, THOUGH STIPULATED, SHALL BE WITHOUT PREJUDICE TO ANY EVIDENTIARY OBJECTION:

None.

VII. THE PARTIES CLAIMS AND DEFENSES

Each section below has been prepared independently by the parties. No party concedes that the opposing parties has correctly set forth the applicable legal standards or ultimate facts for any claim or defense. No party agrees that the ultimate facts stated in any

other party's description of their claims are sufficient to prove such claims.[1]/

A. Plaintiffs' claims:

Over the course of many years, the Montrose DDT manufacturing operation released massive amounts of DDT to the environment. That DDT was released to the sewers and found its way to the ocean; it was dumped directly into the ocean; the operation was so dirty that groundwater below the plant, the soils at and near the plant, and the current and historic storm water pathways are contaminated. All of this contamination has caused EPA and the State to have incurred recoverable costs of responding to the contamination both onshore and offshore. The offshore contamination has caused injuries to natural resources, e.g., bald eagles cannot reproduce, for which the federal and state trustees can recover damages.

1. **First Claim for Relief**: Pursuant to Section 107(a)(1-4)(C) of CERCLA, 42 U.S.C. § 9607(a)(1-4)(C), Plaintiffs are entitled to recover damages "for injury to, destruction of, or loss of natural resources, including reasonable costs of assessing such injury, destruction or loss resulting from such a release." To prove liability under the first claim, Plaintiffs must prove these three elements: (A) the Montrose Plant property is a "facility;" (B) a "release" or "threatened release" of a "hazardous substance" from the facility has occurred; and (C) each of the defendants fall within at least one of the four classes of responsible persons described in 42 U.S.C. § 9607(a)(1-4). See, "Order Granting United States' Motion for Partial Summary Judgment with Respect to the Issue of Liability under the Second Claim for Relief of the Second Amended Complaint of Defendants Montrose Chemical Corporation of California, Atkemix Thirty-Seven, Inc, and Rhone-Poulenc, Inc.," dated April 24, 2000; 42 U.S.C. § 9607(a)(1-4)(C). Thereafter, Plaintiffs must prove that injury to natural resources resulted from the release. Id. Liability of the Defendants is strict, and joint and several.

Plaintiffs thus intend to prove the following ultimate facts to prevail on the First Claim

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[1]/ In particular, the State does not agree that the ultimate facts stated in the Defendants' description of their claims are sufficient to prove such claims.

for Relief. The types of evidence relied on is set forth in brackets following each fact.

a. The Montrose Plant is a "facility" within the meaning of CERCLA. [Already established by Summary Judgment, 4/24/2000].

b. The property upon which the Montrose Plant formerly operated is a "facility" within the meaning of CERCLA. [Already established by Summary Judgment, 4/24/2000].

c. Montrose is a liable party under Section 107(a) of CERCLA as an operator of the Plant throughout the period of operations. [Already established by Summary Judgment, 4/24/2000].

d. Aventis, as the corporate successor to Stauffer Chemical Company and Rhone-Poulenc, Inc., is a liable party under Section 107(a) of CERCLA, as owner of the Plant throughout the period of operations. Stauffer (Aventis) also owned 50% of the stock of Montrose. [Already established by Summary Judgment, 4/24/2000].

e. Chris-Craft, as the corporate successor to Baldwin Montrose and Montrose of New Jersey, and/or through its own actions, is a liable party under Section 107(a) of CERCLA as operator of the Plant throughout the period of operations. [Depositions or testimony of former Montrose employees (Bernard I. Bratter, Guy A. DiMichele, John L. Kallok); Depositions or testimony of Chris-Craft employees (Brian Kelly, James Rochlis, Benjamin Rothberg, Samuel Rotrosen, Daniel Greeno); Deposition of Mulliken; Internal documents, memoranda and correspondence of Montrose and of Chris-Craft; Chris-Craft filings/correspondence with IRS and SEC; Pleadings and responses to discovery].

f. DDT and MCB are each a "hazardous substance" under CERCLA. [Already established by Summary Judgment, 4/24/2000].

g. The Montrose Plant released DDT to the LACSD sewers. [Already established by Summary Judgment, 4/24/2000].

h. The Montrose Plant released DDT to the Pacific Ocean. [Depositions or testimony of former Montrose employees (Bernard I. Bratter, Guy A.

DiMichele, John L. Kallok, Vincent Anicich, Walter Carey, Jack Fitzgerald, Charles Lee Gardner, Ferdinand Suhrer. Kurt M. Weston, Vernon Shehan); Depositions or Testimony of LACSD employees (John Redner; Roger Baird; Norman Ackerman); Testimony of Chartrand, Simanonok, David Young; Documents from LACSD and Montrose; Testimony of Amendola (as an offer of proof)]

i. Montrose's DDT has contaminated the sediments on the Palos Verdes shelf. [Testimony of Lee, Edwards, Eganhouse, Hampton, Murray, Noble, Wheatcroft, Wiberg (for the State and as a proffer for the U.S.); Documents from LACSD; voluminous data documentation, and summaries thereof pursuant to F.R.E. 1006].

j. Montrose's DDT was and is a substantially contributing cause of injuries to natural resources, including sediments, surface waters, fish and birds. [Testimony of various witnesses, described in more detail below]

k. Injury to white croaker has resulted from the release of DDT. [Already established by Summary Judgment, dated June 6, 2000].

l. Injury to white croaker has resulted from the release of DDT from the Montrose Plant to the Ocean. [Testimony of Connolly and cited exhibits; voluminous data documentation, and summaries thereof pursuant to F.R.E. 1006].

m. Injury to bald eagles on Santa Catalina has resulted from the release of DDT. [Testimony of Garcelon, and cited exhibits; voluminous data documentation, and summaries thereof pursuant to F.R.E. 1006].

n. Injury to bald eagles on Santa Catalina has resulted from the release of DDT from the Montrose Plant to the Ocean. [Testimony of Connolly, Garcelon, Jurek, Mesta, and cited exhibits; voluminous data documentation, and summaries thereof pursuant to F.R.E. 1006; proffer testimony of Risebrough, Jarman, Fry].

o. Injury to peregrine falcons on the Northern Channel Islands has resulted from the release of DDT.

p. Injury to peregrine falcons on the Northern Channel Islands has resulted from the release of DDT from the Montrose Plant to the Ocean. [Connolly, Hunt,

Kiff, Walton, Risebrough (offer of proof), Jarman (offer of proof), Fry (offer of proof), Calambokidis (witness for State of California and offer of proof for United States), and cited exhibits].

q. Plaintiffs incurred costs of assessing the foregoing injury, destruction and/or loss resulting from releases of DDT from Montrose, in the amount of $19,042,632, excluding prejudgment interest. [Testimony of Wiley Wright, Certified Public Accountant; Testimony of Brenda Fisher and Michelle McQuillan Re: National Oceanic and Atmospheric Administration ("NOAA") cost procedures; Testimony of Kate Faulkner and Deborah Freeman Re: Department of the Interior ("DOI") cost procedures; Roger Helm (DOI); Testimony of Becky Mack and Michael Martin, Re: California Department of Fish & Game cost procedures; voluminous cost documents including invoices, etc., and a summary thereof pursuant to F.R.E. 1006].

r. The assessment and costs described in the preceding paragraph are reasonable. [Testimony of William Conner and referenced exhibits].

s. Restoration projects can be used to both restore injured resources, acquire the equivalent of the resources, and compensate the public for lost use of the resources. Such projects include artificial reefs, wetland restoration, peregrine falcon restoration, and bald eagle restoration. [Testimony of Ambrose (and Ambrose as an offer of proof); Walton, Garcelon, Josselyn, Conner, Carson (as an offer of proof) and cited exhibits].

2. **Second Claim for Relief**: Pursuant to Section 107(a)(1-4)(A) of CERCLA, 42 U.S.C. § 9607(a)(1-4)(C), Plaintiffs are entitled to recover "all costs of removal or remedial action incurred by the United States or [the] State . . . not inconsistent with the national contingency plan." 42 U.S.C. § 9607(a)(1)-(4)(A). To prove liability under the second claim, Plaintiffs must prove these three elements: (A) the Montrose Plant property is a "facility;" (B) a "release" or "threatened release" of a "hazardous substance" from the facility has occurred; and (C) each of the defendants fall within at least one of the four classes of responsible persons described in 42 U.S.C. § 9607(a)(1-4). See, "Order Granting

Partial Summary Judgment, as amended; 42 U.S.C. § 9607(a)(1-4)(A). Thereafter, Plaintiffs must prove that EPA and DTSC incurred costs in response to such releases or threatened releases, and the amount of such costs. Id. Liability of the Defendants is strict, and joint and several. To defeat recovery, Defendants bear the burden of showing, based on the administrative record and applying an arbitrary and capricious standard, 42 U.S.C. § 9613(j), that the governments incurred the costs in a manner inconsistent with the NCP, and that such inconsistency resulted in demonstrably excess costs.

Plaintiffs thus intend to prove the following ultimate facts. The types of evidence relied on is set forth in brackets following each fact.

a. The Montrose Plant is a "facility" within the meaning of CERCLA. [Already established by Summary Judgment, 4/24/2000].

b. The property upon which the Montrose Plant formerly operated is a "facility" within the meaning of CERCLA. [Already established by Summary Judgment, 4/24/2000].

c. Montrose is a liable party under Section 107(a) of CERCLA as an operator of the Plant throughout the period of operations. [Already established by Summary Judgment, 4/24/2000].

d. Aventis, as the corporate successor to Stauffer Chemical Company and Rhone-Poulenc, Inc., is a liable party under Section 107(a) of CERCLA, as owner of the Plant throughout the period of operations. Stauffer (Aventis) also owned 50% of the stock of Montrose. [Already established by Summary Judgment, 4/24/2000].

e. Chris-Craft, as the corporate successor to Baldwin Montrose and Montrose of New Jersey, and/or through its own actions, is a liable party under Section 107(a) of CERCLA as operator of the Plant throughout the period of operations. [Depositions or testimony of former Montrose employees (Bernard I. Bratter, Guy A. DiMichele, John L. Kallok); Depositions or testimony of Chris-Craft employees (Brian Kelly, James Rochlis, Benjamin Rothberg, Samuel Rotrosen, Daniel Greeno); Deposition of Mulliken; Internal documents, memoranda and correspondence of Montrose and of Chris-

Craft; Chris-Craft filings/correspondence with IRS and SEC; Pleadings and responses to discovery].

f. DDT and MCB are each a "hazardous substance" under CERCLA. [Already established by Summary Judgment, 4/24/2000].

g. The Montrose Plant released DDT and MCB into the environment around the plant. [Already established by Summary Judgment, 4/24/2000].

h. The Montrose Plant released DDT to the LACSD sewers. [Already established by Summary Judgment, 4/24/2000].

i. The Montrose Plant released DDT to the Palos Verdes shelf. [See Section A.1.h. above].

j. EPA has incurred costs in responding to releases of DDT from Montrose to the on-shore areas. [Already established by Summary Judgment, 4/24/2000].

k. EPA has incurred costs in responding to releases of DDT from Montrose to the Palos Verdes shelf. [Testimony of Schauffler].

l. EPA has incurred $11,513,399, including interest, in costs of response to releases of DDT from Montrose to the on shore areas and the Palos Verdes shelf. [Testimony of Chan, Dhont, Fong, Johnson, Jones, Nelson, Pang, Schauffler, Winchell, Charles Young; Administrative record documents; voluminous cost documents (including financial and work performed documents, etc.) and a summary thereof pursuant to F.R.E. 1006].

m. The United States has incurred $11,835,489.26 in costs for Department of Justice enforcement, including prejudgment interest. [Testimony of Kime, Bruffy, O'Rourke, Kushner, voluminous cost documents (including invoices, etc.) and a summary thereof pursuant to F.R.E. 1006].

n. DTSC has incurred costs in responding to releases of DDT from Montrose to the on-shore areas. [Already established by Summary Judgment, 4/24/2000, as amended by "Joint Stipulation and Order" on July 31, 2000].

o. DTSC has incurred costs in responding to releases of DDT from

Montrose to the Ocean. [Testimony of Mahan].

p. DTSC has incurred $256,557.30 in costs of response to releases of DDT from Montrose to the on shore areas and the Ocean ($8968.32 for PVS and $247,588.98 for factory site). [Testimony of Mahan and Conti, voluminous cost documents (including invoices, etc.) and a summary thereof pursuant to F.R.E. 1006].

B. Defendants' Defenses and Counterclaims

Except where specifically noted below, each of the following defenses and counterclaims is raised on behalf of each of the Defendants.

1. Plaintiffs Cannot Recover on Their Claim in Count I for Natural Resource Damages Respecting the Palos Verdes Shelf

Plaintiffs have never delineated which natural resources fall within which government's trusteeship, and have jointly designated all expert and fact witnesses in support of their affirmative claims. Accordingly, each of the following defenses applies equally to both Plaintiffs.

a. Plaintiffs are barred from recovery on Count I because they cannot meet their burden of proving that any injury has occurred for which natural resource damages are recoverable against these Defendants.

(1) Plaintiffs can prove no injury to sediments on the Palos Verdes Shelf ocean floor. Evidence: Field and laboratory experiments of Dr. Peter Chapman — Plaintiffs' sediment expert who has since been withdrawn — demonstrated the sediments are not injured (Exhibit 15172). The voluminous monitoring data on Palos Verdes Shelf invertebrate communities demonstrate that these communities enjoy substantial abundance and diversity, the hallmarks of a healthy sediment ecosystem, and show no effects from any amount of DDT (Exhibit 15172).

(2) Plaintiffs can prove no injury to the water column at the Palos Verdes Shelf. Evidence: Plaintiffs have proffered no expert testimony or other evidence concerning the concentrations of DDT in the water column or whether the Palos Verdes Shelf sediments are the source of any DDT in the water column. Moreover, Plaintiffs' threshold level for DDT in the water column is for a metabolite of DDT for which

the EPA has asserted a much lower threshold value than the DDT metabolite (DDE) that is actually found on the Palos Verdes Shelf (Exhibit 15172). Any alleged concentrations in the water column do not exceed an appropriate threshold, as is demonstrated by the unrebutted real-world evidence that fish and invertebrate populations living over the Palos Verdes Shelf are thriving and show no adverse effects from the presence of any DDT (Exhibit 15172).

(3) Plaintiffs can prove no injury to peregrine falcons at the Channel Islands. Evidence: The fourteen breeding pairs of peregrine falcons on the northern Channel Islands exceed historical estimates of eleven nesting pairs on these islands (Exhibit 15172). Between 1993 and 1997, the population of peregrines on the Channel Islands produced 0.9-1.5 young per nest, a level of productivity that exceeds the benchmark required to ensure a stable population (0.7-1.0 young per nest) (Exhibit 15172).

(4) Damages from alleged injury to white croaker are de minimis at most. Evidence: Plaintiffs have not quantified any "injury" to white croaker as defined in CERCLA or the alleged damages arising therefrom. The State's own data demonstrate there is no actual damage. For example, the commercial fishery for white croaker at the Palos Verdes Shelf prior to its closure in 1990 was paltry, amounting to only a few thousand dollars' worth of fish per year and involving only four or five fishermen (Exhibit 15200). Moreover, these commercial fishermen are able to catch white croaker commercially a very short distance from the closed area. In addition, extensive angler surveys confirm the obvious: white croaker, an undesirable bottom feeder, is rarely caught at the deep depths (40 to 70 meters) in the vicinity of the LACSD outfall (Exhibit 15022). In addition, the Defendants' unrebutted human health risk report demonstrates there is no risk from eating white croaker at the Palos Verdes Shelf, even if anglers were fishing for white croaker there, which they are not (Exhibits 9227, 9228). Further, DDT is not carcinogenic (Exhibits 9200, 9210).

b. Plaintiffs are barred from recovery on Count I because they cannot meet their burden of proving that any releases of hazardous substances by the Defendants are the sole or substantially contributing cause of any injuries to natural resources.

(1) Plaintiffs cannot prove that DDT in the Palos Verdes Shelf sediments has caused or substantially contributed to any injury allegedly suffered by any natural resource. Evidence: See following points.

(2) Plaintiffs cannot prove that the Palos Verdes Shelf sediments are the source of DDT in birds on the Channel Islands. Evidence: Plaintiffs' computer model fails to provide the necessary causal link between the birds and the Palos Verdes Shelf sediments. As the model's author has admitted, the model estimates only the amounts of DDT in the bald eagles and peregrine falcons attributable to the Southern California Bight as a whole — not to the Palos Verdes Shelf sediments specifically. The expert has explicitly admitted, as he had to, that he can not testify that the Palos Verdes Shelf has been the source of DDT to the birds at issue (Connolly deposition). As Defendants' experts will demonstrate, thousands of tons of DDT were applied to the agricultural fields in Southern California that continue to drain to the ocean via the rivers and other run-off as the source of the DDT in the birds (Exhibits 9037, 9038). Indeed, the ratio of DDT to PCBs — known as the "fingerprint" — in the Palos Verdes Shelf sediments and the fish that feed there is over 10 to 1. By contrast, the ratio of DDT to PCBs in the eagles and falcons at the Channel Islands is only approximately 3.6 to 1 or less — the same ratio as found in agricultural runoff, demonstrating that the DDT in these birds is conclusively not from the Palos Verdes Shelf sediments (Exhibits 15027, 15171, 15172).

(3) Plaintiffs cannot prove that, but for the DDT in the Palos Verdes Shelf sediments, there would be healthier populations of bald eagles or peregrine falcons on the Channel Islands than there are currently. Evidence: Bald eagles and peregrine falcons on the Channel Islands have been subject to severe human disturbance, such as shooting, egg collection, and destruction of habitat, to the point where such birds were virtually extirpated from the Channel Islands before Montrose even began to manufacture DDT (Exhibit 15172). The bald eagles does not have a sufficient on-shore population to sustain a population on Santa Catalina (Exhibit 15172).

(4) Plaintiffs cannot prove that DDT in the Palos Verdes Shelf

sediments cause injury to benthic-dwelling invertebrates. Evidence: Unrebutted statistical analyses by Defendants' experts find no relationship between DDT in the Palos Verdes Shelf sediments and the invertebrate communities (Exhibit 15172).

(5) Plaintiffs cannot prove that DDT has caused reproductive injury to white croaker. Evidence: Two of Plaintiffs' three putative experts on this topic (Drs. Jo Ellen Hose and Jeffrey Cross) have been stricken as a sanction for government misconduct, and the third (Dr. Peter Thomas) has been withdrawn from Plaintiffs' witness list.

(6) Plaintiffs cannot prove that the Palos Verdes Shelf DDT will become more bio-available in the future than it is currently. Evidence: The Palos Verdes Shelf remains a depositional (as opposed to erosional) environment, and the DDT there is continuing to be further buried (Exhibit 9223). In addition, the buried DDT is harmlessly biodegrading, as established in experiments conducted by Defendants' experts (Exhibits 9203, 9204, 9223, 9234, 9235, 9239).

(7) Plaintiffs cannot prove that material amounts of DDT in the sediments at the Palos Verdes Shelf originated from Montrose. Evidence: Plaintiffs can offer no probative evidence about (i) the volume of DDT contained in Montrose's process waste water discharges to the LACSD sewer system; (ii) the volume of DDT discharged by LACSD onto the Palos Verdes Shelf; or (iii) the proportion of the DDT in LACSD's discharges to the Shelf, if any, that originated at the Montrose plant. Moreover, Montrose's discharges to the LACSD sewer system ended in 1971. To the extent any DDT from the Montrose plant made its way to the Palos Verdes Shelf sediments, that DDT has been buried over the intervening 30 years by natural sedimentation and LACSD effluent solids, and is no longer bioavailable (Exhibit 9223). Any DDT from the Palos Verdes Shelf sediments that is bio-available to animals is found in the surface sediments only, and has a source other than historical Montrose discharges, including agricultural run-off and advection from outside the area (Exhibit 9223).

c. Plaintiffs are barred from recovery on Count I because, even if DDT from Montrose was discharged into the LACSD

sewer system, LACSD's handling and actual disposal of the discharges from Montrose's plant is an intervening cause that relieves Montrose and the other Defendants of any liability.

(1) Any release of DDT to the PVS came not from the Montrose Plant, but rather from the LACSD pipes, which comprise a separate facility under CERCLA. Evidence: Montrose did not discharge its process waste water directly to the Palos Verdes Shelf, but instead gave it to LACSD for disposal pursuant to state permit. Any discharge of Montrose's DDT to the PVS came from LACSD's White's Point Outfall, a separate facility Defendants neither owned nor operated, but one that was created precisely to take and treat waste and then, with the permission of the state and federal governments, discharge it to the Palos Verdes Shelf.

d. Even if Plaintiffs could somehow meet their burden of proving that natural resources in the Southern California Bight are injured by DDT, they cannot recover any natural resource damages.

(1) Plaintiffs' natural resource damage claim has four components: (i) the value of interim lost use services; (ii) the cost of "restoration projects" (i.e., construction of artificial reefs and restoration of coastal wetlands); (iii) the cost of programs to enhance bald eagle and peregrine falcon populations; and (iv) damage assessment costs. Evidence: In 1997, Plaintiffs submitted a figure of $357 million as their calculation of natural resource damages in seeking approval of the settlements with the PCB defendants and the LACSD. It also is the amount stated by Plaintiffs in response to Defendants' damages interrogatories, where the $357 million is broken down as follows: (i) $305 million for the value of interim lost services, based upon the government's so-called "contingent valuation" survey (which the Court has stricken); (ii) $12.7 million for the cost of a restoration program to maintain and enhance the bald eagle population on Santa Catalina Island, and to "reintroduce" bald eagles to the northern Channel Islands; (iii) $9.2 million for the cost of a restoration program to maintain and increase the peregrine falcon population on the Channel Islands; and (iv) $30 million for damage assessment costs. Plaintiffs also set forth as an alternative damage remedy the cost of so-called "restoration projects" –

specifically, construction of artificial reefs and restoration of coastal wetlands (not even alleged to have been damaged by Defendants) – which the government estimates would cost "less than $100 million." Id. at 17-18.

(2) Plaintiffs have waived any claim for natural resource damages other than those they identified in their interrogatory response and in support of their putative settlements with LACSD and the PCB defendants. Evidence: Plaintiffs failed in their interrogatory responses to specify any damage for the following natural resources, as to which they had previously claimed damages: sediments; the water column; marine mammals; and bird species other than bald eagles and peregrine falcons.

(3) Plaintiffs cannot prove the alleged value of interim lost services. Evidence: The Court has excluded the government's only evidence in support of its claim: the contingent valuation study. The government has designated no other experts to quantify the alleged value of interim lost services and can therefore offer no probative evidence at trial to prove any lost use damages.

(4) Plaintiffs cannot prove any connection between the proposed "restoration" projects and allegedly injured resources. Evidence: Plaintiffs have not shown or even alleged that DDT has reduced wetlands in Southern California in any respect, and likewise have not shown that DDT has reduced fishing opportunities at the Palos Verdes Shelf. There are no wetlands to be restored at the Palos Verdes Shelf or sufficiently near the Palos Verdes Shelf to be of any benefit to allegedly injured animals there. Similarly, construction of an artificial reef will not increase the scant recreational or commercial fishery for white croaker (which is a bottom-dwelling, undesirable species that is not attracted to reefs) or for any other species allegedly injured by the Defendants' DDT. Both of these remedies are economically grossly disproportionate to the harm that allegedly occurred with respect to white croaker or any other resource. Both of Plaintiffs' putative experts (Drs. Ambrose and Josselyn) admitted that their expert reports were preliminary and that government could not proceed without significant further expert analysis.

(5) Plaintiffs cannot prove that any injury to Channel Island

bald eagles and peregrine falcons was caused by DDT from Montrose or from the Palos Verdes Shelf sediments. Evidence: See above.

e. The governments' alleged natural resource damage assessment costs are not recoverable.

(1) Because Defendants are not liable to the government for natural resource damages, they also are not liable to reimburse the government for its alleged cost of conducting the damage assessment. Evidence: See above.

(2) Plaintiffs cannot show that their alleged natural resource damage assessment costs are reasonable. Evidence: Well over $11 million was spent by the government to perform the now-stricken contingent valuation study. In addition, the Court has ruled that the government may not recover the costs of other stricken or withdrawn experts. The government has spent substantial amounts of money preparing reports of experts now stricken or withdrawn. Also, the government has included among its alleged "assessment costs" certain amounts that relate solely to time spent by the Department of Justice or its consultants litigating the natural resource damage claim.

(3) The government's assessment costs are not adequately documented to establish their reasonableness and are not recoverable for that reason alone. Evidence: In many instances, the government has not produced documentation sufficient to prove that a cost relates to the natural resource damage assessment, or even was paid by the government. Relatedly, a substantial portion of the government's assessment cost claim is not documented in accordance with generally accepted accounting principles or the National Contingency Plan. (Exhibit 15023).

f. Plaintiffs cannot meet their burden of establishing any entitlement to recover natural resource damages for injuries that occurred before CERCLA's enactment in 1980

(1) Under Judge Hauk's order dated March 22, 1995, Plaintiffs bear the burden of establishing that any pre-enactment damages they seek to recover are indivisible from post-enactment damages. Plaintiffs cannot meet this burden because any post-enactment damages are divisible from pre-enactment damages.

g. To the extent Plaintiffs can establish any entitlement to recovery of natural resource damages, their recovery is capped at $50 million.

(1) CERCLA limits recovery of natural resource damages to $50 million for each incident involving release of a hazardous substance. For purposes of CERCLA's $50 million cap, any injuries to natural resources arising from the presence of DDT in the Palos Verdes Shelf or from discharges from the former Montrose plant comprise a single incident.

2. Plaintiffs Cannot Recover on Their Claim in Count II for Response Costs Respecting the Palos Verdes Shelf

a. Any DDT in the Palos Verdes Shelf ("PVS") sediments came from LACSD's outfall pipe, and LACSD's handling and ultimate release of such DDT to the environment relieves Defendants of any potential liability.

Evidence: See Point I.C.1 above.

b. There is no basis for Plaintiffs to proceed with a response action at the Palos Verdes Shelf, as EPA has not and cannot identify any risk to human health or the environment resulting from conditions at the Shelf.

(1) Plaintiffs cannot prove that the residual DDT present in the effluent-affected sediments at the Palos Verdes Shelf pose a substantial danger to human health or the environment. Evidence: EPA commissioned both a human health and ecological risk assessment of these DDT residues. These assessments were tainted by misconduct, and the lead author of each report has been stricken as an expert. (Court Order dated July 5, 2000). Thus, EPA has no available human health or ecological risk assessment upon which it may attempt to prove risk. In any event, EPA's stricken assessments contained concocted, fictitious risks based upon unjustified assumptions that bear no relationship to conditions at the Palos Verdes Shelf. In reality, the DDT residues at the Palos Verdes Shelf do not present any substantial risk to human health or the environment, as evidenced by unrefuted scientific work by Defendants' experts. Dr. Dennis Paustenbach made risk calculations showing only negligible risks to any anglers who might eat fish from the Palos Verdes Shelf or nursing infants whose mothers might eat fish caught by such anglers (Exhibits 9227, 9228). Two thorough, year-round studies of anglers at the Palos Verdes

Shelf by Defendants' experts found virtually no fishing for white croaker, the fish with the highest levels of DDT (Exhibit 15022). Defendants' experts have described a dramatic recovery of the ecosystem at the Palos Verdes Shelf and region, and the general health of this ecosystem (Exhibit 15172).

c. EPA's remedies for the Palos Verdes Shelf are arbitrary and capricious.

(1) EPA pre-selected capping as the remedy for the Palos Verdes Shelf shortly after becoming involved with it in 1995. Evidence: Six months before publicly announcing the start of the EE/CA, EPA directed the Army Corps of Engineers to develop a design for an in-situ capping option on the Palos Verdes Shelf. EPA then instructed the authors of the EE/CA to consider a range of alternatives so that it did not appear that capping had been pre-selected. In 1998, although EPA had still not completed its evaluation of response alternatives for the Palos Verdes Shelf, EPA presented its capping plan to the agency's National Remedy Review Board for approval (Exhibit 9394).

(2) EPA used the Technical Advisory Committee (TAC) as a mere pretext to create the false impression that EPA had an open mind on remediation options for the PVS. Evidence: EPA did not disclose to the TAC that it had asked for, and received, NRRB approval of a capping remedy in 1998. EPA has never responded to the comments and expert technical reports submitted by Defendants and other members of the TAC. EPA made no material changes to the EE/CA in response to Defendants' submissions, and selected its $22 million institutional controls program without any input from the TAC.

(3) EPA also violated the Federal Advisory Committee Act ("FACA") in creating and controlling the TAC. Evidence: In establishing the TAC, EPA made no attempt to comply with the requirements of FACA; meetings of the TAC were not published in the Federal Register or open to the public. Interested parties were not permitted to make statements to the TAC. EPA did not prepare minutes of the TAC meetings and did not record its proceedings.

(4) EPA's capping project will create substantial adverse impacts, and will not result in any benefit to the ecosystem or human health. Evidence: Attempts to emplace the cap will create substantial risks that the existing sediments containing DDT compounds and PCBs will be scoured, flow along the Shelf in density currents, and possibly fail in a catastrophic underwater landslide. Each of these processes would introduce currently buried DDT compounds and PCBs back into the water column. The area to be capped is on an active seismic fault line. If capping material failed during an earthquake, the now-buried DDT will become re-exposed and will re-enter the environment en masse (Exhibits 9220, 9224). The cap will likely damage restored kelp beds that currently flourish at PVS, and will destroy the healthy benthic community living in the PVS sediments (Exhibit 9226). Placement of the cap will also disrupt microbes present in the sediment that are known to be biodegrading DDE. Capping will not produce any measurable decrease in the DDT levels in fish, birds, or mammals, beyond those decreases already known to be occurring (Exhibit 9224).

(5) The package of institutional controls selected by EPA for the PVS grossly exceeds any reasonable set of controls and is based on a record devoid of any support for the controls selected. Evidence: EPA's plan proposes to use approximately the same number of Fish and Game wardens that currently enforce all fishing restrictions from Santa Barbara County to the Oregon border, and from the shoreline to 200 miles out to sea, covering an area of about 108,000 square miles. One warden located on the bluff overseeing the Palos Verdes Shelf would be able to monitor the entire area using a spotting scope. EPA has conceded that it has made no effort to quantify the benefits of the proposed plan, no effort to quantify any reduction in human health risks that would be achieved by the proposed plan, and has no plans to embark on any such analysis.

d. EPA's removal actions are in violation of CERCLA.

(1) EPA's alleged removal costs are being incurred in violation of CERCLA's § 104(c)(1)'s express limits on removal actions to one year and $2 million. Evidence: Each and every PVS removal action being considered by the agency

greatly exceeds these limits. EPA's institutional controls are to be in place for 10 years and cost $22 million. EPA's "pilot" cap alone will cost $5 million; the final cap will take years to complete.

e. EPA is in violation of the Court's order regarding selection of remedy for the Palos Verdes Shelf

(1) EPA failed to make a final determination as to removal actions, if any, for the Palos Verdes Shelf by May 31, 2000 as set forth in the Court's order of February 14, 2000 and confirmed in the Court's order of June 5, 2000.

f. EPA's response costs incurred for the Palos Verdes Shelf are not recoverable

(1) The purported response costs allegedly related to the Palos Verdes Shelf are barred by the Court's prior rulings. Evidence. The over $2 million sought by EPA consists primarily of costs already barred by the Court's prior rulings, including: (a) amounts paid to SAIC for Iris Winstanley's stricken human health risk assessment; (b) amounts paid to SAIC for John Scott's stricken ecological risk assessment; (c) amounts paid to the U.S. Army Corps of Engineers for Michael Palermo's stricken capping feasibility study; (d) amounts paid to SAIC and the Corps for attending TAC meetings; and (e) EPA time charges for overseeing the TAC and creation of the studies listed above. Not only are these costs barred by the Court's prior rulings, Plaintiffs have not proven that Defendants are liable for the PVS sediments, the EPA violated CERCLA's $2 million and 12-month limits on removal actions, the EPA violated the NCP by performing an EE/CA rather than an RI/FS, and the decision to incur these costs was arbitrary and capricious given the known absence of risk.

g. DOJ's alleged response costs are not recoverable.

(1) Plaintiffs cannot prove the true amount of response costs incurred by DOJ in connection with Count Two of the Third Amended Complaint (the EPA claim). Evidence: DOJ consciously misbilled millions of dollars of charges to the EPA claim account that should have been billed to the NRD claim account. DOJ also failed to maintain sufficient records to determine which charges billed to the EPA account were

placed there improperly. (Exhibit 15024). As a result, DOJ is unable to determine the true cost of its work on the EPA claim. Since this billing practice was uncovered, DOJ appears to have made a deduction of more than $7 million to its DOJ claim, primarily by removing from its claim all charges billed prior to March, 1995. But DOJ has not made appropriate deductions to its post-March, 1995 charges in order to account for work performed with respect to the NRD claim. Its documentation does not permit a reliable calculation.

(2) Plaintiffs cannot show that the DOJ response costs are reasonable. See United States v. Chapman, 146 F.3d 1166 (9th Cir. 1998). Evidence: Because DOJ is unable to account for its DOJ response costs (as a result of its misbilling), it likewise is unable to show that the amounts incurred in connection with the EPA claim are reasonable.

(3) The DOJ response costs are not adequately documented and are not accounted for accurately in accordance with generally accepted accounting practices or the National Contingency Plan. Evidence: Because DOJ commingled its NRD and EPA accounts and made no effort to distinguish between them, the documentation does not provide an accurate accounting of its alleged response costs (the EPA claim). Also, DOJ's documentation in support of its costs does not satisfy generally accepted accounting practices, related EPA financial management guidance governing response cost claims, or the NCP. (Exhibit 15024).

3. To the Extent There Are Any Recoverable Natural Resource Damages or Response Costs Associated with the Palos Verdes Shelf, Plaintiffs Are Liable for Them under Defendants' Counterclaims

CLAIMS AGAINST THE STATE OF CALIFORNIA

a. CERCLA Cost Recovery

(1) The State arranged for disposal of hazardous substances into and from the Southern California Bight, including the Palos Verdes Shelf, under section 107(a)(3) of CERCLA, 42 U.S.C. § 9607(a)(3).

(2) The Southern California Bight, including the Palos Verdes Shelf, is a "facility" within the meaning of section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

(3) "Hazardous substances" have been "released" into and from the Southern California Bight, including the Palos Verdes Shelf within the meaning of sections 101(14) and (22) of CERCLA, 42 U.S.C. §§ 9601(14) and (22).

(4) Such releases are not attributable to any action by Defendants.

(5) Defendants have incurred response costs consistent with the National Contingency Plan including, but not limited to, the costs of monitoring, assessing, and evaluating the releases or threatened releases of hazardous substances alleged in the Complaint.

(6) The State is liable for any response costs incurred by Defendants in this action.

b. CERCLA Contribution

(1) Defendants incorporate here by reference the ultimate facts set forth in part III.A, above.

(2) Defendants are entitled to contribution from the State for their response costs under CERCLA section 113(f), 42 U.S.C. § 9613(f).

(3) Furthermore, to the extent Defendants are liable for any purported response costs incurred by any other party and/or for injuries to natural resources, Defendants are entitled to contribution from the State under CERCLA section 113(f), 42 U.S.C. § 9613(f).

c. Negligence

(1) The State of California (the "State") owes a duty to ensure that activities on its property, including the Southern California Bight (which encompasses the Palos Verdes Shelf), do not cause injury to Defendants and the public at large.

(2) The State breached its duty by allowing the Southern California Bight, including the Palos Verdes Shelf, to be used as a dumping ground for all manner of industrial waste and sewage resulting in the injuries that have been alleged to exist in this action.

(3) As a proximate cause of the State's breach, Defendants have suffered injury and damage.

(4) Defendants have suffered injury and damage in the form of response costs to investigate conditions existing in the Southern California Bight, including the Palos Verdes Shelf. Defendants have suffered further injury and damage in that they have been singled out for prosecution under CERCLA, and as a result face the prospect of joint and several liability for contamination caused by third parties. Defendants have suffered further injury and damage as members of the public to the extent that the State's actions have caused injuries to natural resources.

d. Negligence Per Se

(1) The State of California owes a duty to ensure that activities on its property, including the Southern California Bight (which encompasses the Palos Verdes Shelf), do not cause injury to Defendants and the public at large.

(2) The State breached its duty by allowing the Southern California Bight, including the Palos Verdes Shelf, to be used as a dumping ground for all manner of industrial waste and sewage, in violation of a number of statutes and regulations designed to prevent injury to the environment and natural resources resulting in the injuries that have been alleged to exist in this action. Evidence: California Water Code §§ 13305, 13142 and 13142.5 (duty to abate nuisance and treat waste water discharges); California Fish & Game Code §§ 1600, 1700, 1701, 1755, 1801, 1802 and 5651 (duty to protect wildlife and marine resources); California Health & Safety Code §§ 25150(a) (duty to promulgate regulations for the management of hazardous waste), 39002 (duty to undertake control activities), and 39606 (duty to adopt standards of ambient air quality); 42 U.S.C. § 7410 (duty to adopt and submit a plan to the EPA which provides for the implementation of air quality standards); 33 U.S.C. § 1313(c) (duty to revise and adopt water quality standards).

(3) As a proximate cause of the State's breach, Defendants have suffered injury and damage.

(4) Defendants have suffered injury and damage in the form

of response costs to investigate conditions existing in the Southern California Bight, including the Palos Verdes Shelf. Defendants have suffered further injury and damage in that they have been singled out for prosecution under CERCLA, and, as a result face the prospect of joint and several liability for contamination caused by third parties. Defendants have further suffered injury and damage as members of the public to the extent that the State's actions have caused injuries to natural resources.

e. Public Nuisance

(1) The State created or maintained a public nuisance on its property by allowing the Southern California Bight, including the Palos Verdes Shelf, to be used as a dumping ground for all manner of industrial waste and sewage.

(2) This nuisance has affected a considerable number of citizens of the State to the extent it has resulted in the injuries that have been alleged to exist in this action. The nuisance is specially injurious to Defendants in that Defendants have been singled out for prosecution by Plaintiffs for liability relating to the nuisance created by the State.

(3) As a proximate cause of this nuisance, Defendants and the public have suffered injury and damage.

(4) Defendants have suffered injury and damage in the form of response costs to investigate conditions existing in the Southern California Bight, including the Palos Verdes Shelf. Defendants have suffered further injury and damage in that they have been singled out for prosecution under CERCLA, and, as a result face the prospect of joint and several liability for contamination caused by third parties. Defendants have suffered further injury and damage as members of the public to the extent that the State's actions have caused injuries to natural resources.

f. Dangerous Condition

(1) The State has created a dangerous condition on its property, which has existed since the time of the alleged injury to Plaintiffs and continues to this day, by allowing the Southern California Bight, including the Palos Verdes Shelf, to be

used as a dumping ground for all manner of industrial waste and sewage.

(2) The State's actions in this regard created a reasonably foreseeable risk of damage and injury to Defendants and the public at large. Prior to permitting LACSD's activities on the Palos Verdes Shelf, the State was aware that discharges from sewage outfalls could result in injury.

(3) Negligent or wrongful actions or omissions by employees of the State within the scope of their employment created the dangerous condition, including actions or omissions by the State Department of Fish and Game, the State Lands Commission, the State Board of Health, and the Los Angeles Regional Water Quality Control Board.

(4) The State had constructive and actual notice of the dangerous condition created by its actions within sufficient time prior to the injury to Defendants to have taken measures to protect against such injury. The State has known of the dangerous conditions existing in the Southern California Bight, including the Palos Verdes Shelf, caused by the dumping of sewage and industrial wastes for at least 50 years, and has always had the ability to remedy the condition through its power to prevent or control activities on its property.

(5) The State failed to remedy the dangerous condition existing in the Southern California Bight, including the Palos Verdes Shelf, or take steps necessary to protect Defendants from injury resulting in the injuries that have been alleged to exist in this action.

(6) As a proximate cause of this dangerous condition, Defendants and the public have suffered injury and damage.

(7) Defendants have suffered injury and damage in the form of response costs to investigate conditions existing in the Southern California Bight, including the Palos Verdes Shelf. Defendants have suffered further injury and damage in that they have been singled out for prosecution under CERCLA, and, as a result face the prospect of joint and several liability for contamination caused by third parties. Defendants

have suffered further injury and damage as members of the public to the extent that the State's actions have caused injuries to natural resources.

g. Breach of Mandatory Duty

(1) The State of California owes a mandatory duty under various state and federal statutes and regulations to maintain the Southern California Bight, including the Palos Verdes Shelf, in a manner that does not cause harm to the environment. Evidence: California Water Code §§ 13305, 13142 and 13142.5 (duty to abate nuisance and treat waste water discharges); California Fish & Game Code §§ 1600, 1700, 1701, 1755, 1801, 1802 and 5651 (duty to protect wildlife and marine resources); California Health & Safety Code §§ 25150(a) (duty to promulgate regulations for the management of hazardous waste), 39002 (duty to undertake control activities), and 39606 (duty to adopt standards of ambient air quality); 42 U.S.C. § 7410 (duty to adopt and submit a plan to the EPA which provides for the implementation of air quality standards); 33 U.S.C. § 1313(c) (duty to revise and adopt water quality standards).

(2) The State's mandatory duties under the statutes and regulations referenced in the preceding paragraph were designed to protect against risk of injury to the environment and to the public, of which Defendants are members.

(3) The State breached its mandatory duties by allowing the Southern California Bight, including the Palos Verdes Shelf, to be used as a dumping ground for all manner of industrial waste and sewage resulting in the injuries that have been alleged to exist in this action.

(4) Defendants have suffered injury and damage in the form of response costs to investigate conditions existing in the Southern California Bight, including the Palos Verdes Shelf. Defendants have suffered further injury and damage in that they have been singled out for prosecution under CERCLA, and, as a result face the prospect of joint and several liability for contamination caused by third parties. Defendants have suffered further injury and damage as members of the public to the extent that the State's actions have caused injuries to natural resources.

h. Breach of Public Trust

(1) The State holds the natural resources of the State in trust on behalf of the public.

(2) The State owes a duty Defendants and the public to exercise supervision and control over natural resources in a manner that protects the natural resources of the State.

(3) The State breached its duty by allowing the Southern California Bight, including the Palos Verdes Shelf, to be used as a dumping ground for all manner of industrial waste and sewage resulting in the injuries that have been alleged to exist in this action.

(4) As a proximate cause of this dangerous condition, the State has caused injury and damage to the public, and to Defendants in particular, as the beneficiaries of the State's trusteeship.

(5) Defendants have suffered injury and damage in the form of response costs to investigate conditions existing in the Southern California Bight, including the Palos Verdes Shelf. Defendants have suffered further injury and damage in that they have been singled out for prosecution under CERCLA, and, as a result face the prospect of joint and several liability for contamination caused by third parties. Defendants have suffered further injury and damage as members of the public to the extent that the State's actions have caused injuries to natural resources.

i. Invalidity of Commercial Fish Ban

(1) Plaintiffs rely on a regulatory ban on commercial fishing for white croaker as proof of injury to natural resources. The regulation, at Section 104 of Title 14 of the California Code of Regulations, is invalid. The California Department of Health Services never made the required finding under Fish and Game Code § 7715(a) that white croaker posed a likely human health risk, nor did DHS rely on the required "thorough and adequate scientific evidence" in recommending that the regulation be promulgated. The "risk assessment" upon which the regulation was based constituted only on a "theoretical"

risk derived by using overly conservative assumptions with no basis in fact.

(2) DHS's adoption of the fish ban regulation in reliance on "risk assessment guidelines" violated Cal. Gov't Code § 11347.5, because DHS did not formally adopt the risk assessment guidelines as regulations as required by the California Administrative Procedure Act.

(3) The rulemaking pursuant to which the regulation was promulgated was procedurally unlawful and violative of the California Administrative Procedure Act, because (i) Fish and Game did not consider alternatives to the regulation; and (ii) Fish and Game failed to allow public comment on certain data and reports before adopting the regulation.

CLAIMS AGAINST THE UNITED STATES

i. CERCLA Cost Recovery

(1) The United States arranged for disposal of hazardous substances from its military facilities, such as the Point Mugu Naval Air Weapons Station and the Naval Complex at Long Beach, into the Southern California Bight, including the Palos Verdes Shelf, under section 107(a)(3) of CERCLA, 42 U.S.C. § 9607(a)(3).

(2) The Southern California Bight, including the Palos Verdes Shelf, is a "facility" within the meaning of section 101(9) of CERCLA, 42 U.S.C. § 9601(9). The military facilities such as the Point Mugu Naval Air Weapons Station and the Naval Complex at Long Beach are each a "facility" within the meaning of section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

(3) The United States also is the current owner and operator of military bases such as the Point Mugu Naval Air Weapons Station and the Naval Complex at Long Beach within the meaning of section 101(20)(A) of CERCLA, 42 U.S.C. section 9601(20)(A), and was also the owner or operator at the time of disposal of hazardous substances.

(4) "Hazardous substances" have been "released" from the Point Mugu Naval Air Weapons Station and the Naval Complex at Long Beach into the

Southern California Bight, including the Palos Verdes Shelf, within the meaning of sections 101(14) and (22) of CERCLA, 42 U.S.C. §§ 9601(14) and (22).

(5) Such releases are not attributable to any action by Defendants.

(6) Defendants have incurred response costs consistent with the National Contingency Plan including, but not limited to, the costs of monitoring, assessing, and evaluating the releases or threatened releases of hazardous substances alleged in the Complaint.

(7) The United States is liable for any response costs incurred by Defendants in this action.

j. CERCLA Contribution

(1) Defendants incorporate here by reference the ultimate facts set forth in part III.I, above.

(2) Defendants are entitled to contribution from the United States for their response costs under CERCLA section 113(f), 42 U.S.C. § 9613(f).

(3) Furthermore, to the extent Defendants are liable for any purported response costs incurred by any other party and/or for injuries to natural resources, Defendants are entitled to contribution from the United States under CERCLA section 113(f), 42 U.S.C. § 9613(f).

k. Negligence

(1) The United States owes a duty to ensure that activities on its property, including military bases such as the Point Mugu Naval Air Weapons Station and the Naval Complex at Long Beach, do not cause injury to Defendants and the public at large.

(2) The United States breached its duty by releasing and allowing the release of hazardous substances from its military facilities such as the Point Mugu Naval Air Weapons Station and the Naval Complex at Long Beach into the Southern California Bight, including the Palos Verdes Shelf, resulting in the injuries that have been alleged to exist in this action.

(3) As a proximate cause of the United States's breach, Defendants have suffered injury and damage.

(4) Defendants have suffered injury and damage in the form of response costs to investigate conditions existing in the Southern California Bight, including the Palos Verdes Shelf. Defendants have suffered further injury and damage in that they have been singled out for prosecution under CERCLA, and as a result face the prospect of joint and several liability for contamination caused by third parties. Defendants have suffered further injury and damage as members of the public to the extent that the United States's actions have caused injuries to natural resources.

l. Negligence Per Se

(1) The United States owes a duty to ensure that activities on its property, including military bases such as the Point Mugu Naval Air Weapons Station and the Naval Complex at Long Beach, do not cause injury to Defendants and the public at large.

(2) The United States breached its duty by releasing and allowing the release of hazardous substances from its military facilities, such as the Point Mugu Naval Air Weapons Station and the Naval Complex at Long Beach, into the Southern California Bight, including the Palos Verdes Shelf, in violation of various federal and state statutes and regulations.

(3) As a proximate cause of the United States's breach, Defendants have suffered injury and damage.

(4) Defendants have suffered injury and damage in the form of response costs to investigate conditions existing in the Southern California Bight, including the Palos Verdes Shelf. Defendants have suffered further injury and damage in that they have been singled out for prosecution under CERCLA, and, as a result face the prospect of joint and several liability for contamination caused by third parties. Defendants have further suffered injury and damage as members of the public to the extent that the United States's actions have caused injuries to natural resources.

m. Breach of Mandatory Duty

(1) The United States owes a mandatory duty under various state and federal statutes and regulations to maintain its property, including military bases such as the Point Mugu Naval Air Weapons Station and the Naval Complex at Long Beach, in a manner that does not cause harm to the environment.

(2) The United States's mandatory duties under such statutes and regulations were designed to protect against risk of injury to the environment and to the public, of which Defendants are members.

(3) The United States breached its mandatory duties by releasing and allowing the release of hazardous substances from its military facilities, such as the Point Mugu Naval Air Weapons Station and the Naval Complex at Long Beach, into the Southern California Bight, including the Palos Verdes Shelf.

(4) Defendants have suffered injury and damage in the form of response costs to investigate conditions existing in the Southern California Bight, including the Palos Verdes Shelf. Defendants have suffered further injury and damage in that they have been singled out for prosecution under CERCLA, and, as a result face the prospect of joint and several liability for contamination caused by third parties. Defendants have suffered further injury and damage as members of the public to the extent that the United States's actions have caused injuries to natural resources.

n. Breach of Public Trust

(1) The United States holds the natural resources of the United States in trust on behalf of the public.

(2) The United States owes a duty Defendants and the public to exercise supervision and control over natural resources in a manner that protects the natural resources of the United States.

(3) The United States breached its duty by releasing and allowing the release of hazardous substances from its properties, such as the Point Mugu Naval Air Weapons Station and the Naval Complex at Long Beach, into the Southern California Bight, including the Palos Verdes Shelf.

(4) As a proximate cause of this breach, the United States has caused injury and damage to the public, and to Defendants in particular, as the beneficiaries of the United States's trusteeship.

(5) Defendants have suffered injury and damage in the form of response costs to investigate conditions existing in the Southern California Bight, including the Palos Verdes Shelf. Defendants have suffered further injury and damage in that they have been singled out for prosecution under CERCLA, and, as a result face the prospect of joint and several liability for contamination caused by third parties. Defendants have suffered further injury and damage as members of the public to the extent that the United States's actions have caused injuries to natural resources.

CLAIMS FOR DECLARATORY RELIEF

o. An actual and justiciable controversy has arisen and now exists between Defendants and Plaintiffs as to their respective rights and liabilities for any claims arising out of the alleged contamination of the Southern California Bight, including the Palos Verdes Shelf.

4. Plaintiffs Are Barred from Recovering on Their Claim in Count II to Recover Response Costs Respecting Much of the Upland Area, and Can Only Recover Reasonable Costs for the Remainder.

a. Overview

"Upland Areas" refers to four distinct areas: (a) the Montrose plant property and the immediately adjacent Normandie Avenue Ditch and Los Angeles Power Department right-of-way; (b) a section of 204th Street, Torrance, California (roughly a quarter-mile from the Montrose plant) ("204th Street); (c) the residential neighborhood around 204th Street (the "Neighborhood"); and (d) a storm water drainage way running from the Kenwood Drain, to the Torrance Lateral, to the Consolidated Slip and into the Dominguez Channel. Although the Court has found Montrose and Aventis/Atkemix liable under CERCLA for the Montrose plant property, no defendant has been held liable for 204th Street, the Neighborhood, or the storm water drainage way.

b. EPA's remedial actions relating to the Montrose plant property are arbitrary, capricious and inconsistent with the NCP

(1) EPA's selection of a 700 gallon per minute pump-and-treat system to address dissolved groundwater contamination was arbitrary, capricious and inconsistent with the NCP.

Defendants are not liable for the excessive costs that will result from EPA's selected remedy for groundwater contamination at the Montrose site. The EPA remedy, an approximately 700 gpm pump-and-treat system, is unwarranted and beyond what is reasonably required by the existing groundwater conditions. EPA's failure to endorse Montrose's proposed remedy, its insistence on joint management of the Montrose and Del Amo groundwater plumes, and its choice of an unnecessarily aggressive remedy constitute arbitrary and capricious actions inconsistent with the NCP. EPA's decision to require separate calculations of risks to hypothetical consumers of groundwater within the MCB plume at various distances from the Montrose plant when the EPA already concluded that the risk was unacceptable at further distances from the plant site was arbitrary, capricious and inconsistent with the NCP.

(2) EPA's decision to require Montrose to continue investigating unnecessary remedies for on-site and near property soils is arbitrary and capricious and inconsistent with the NCP.

Although the appropriate remedy to address the elevated levels of DDT in the surface soils on and in the immediate vicinity of the Montrose plant and deep soils in the plant's former Central Process Area is to excavate and place certain off-site soils on the site, and then place an impermeable cap over the entire site, the EPA has required extensive additional, unnecessary investigations. For example, EPA has required Montrose to analyze the possibility of implementing a soil vapor extraction system for volatile organic compounds in deep on-site soils, despite EPA's knowledge that such a system is completely unnecessary.

(3) Any decision by EPA to require defendants to remediate DNAPL at the former plant site would be arbitrary, capricious and inconsistent with the NCP.

Defendants cannot be liable for the costs of studying or implementing DNAPL remediation because it is technically impracticable to recover this material from deep soil and groundwater. Any decision to remediate DNAPL at the site would be arbitrary, capricious and inconsistent with the NCP, and Defendants cannot be made to pay for the costs related to such unnecessary remedial action.

c. Defendants are not liable for the $6 million incurred by EPA in excavating soils at residences along 204th Street, Torrance, California

Defendants are not liable under CERCLA for any costs relating to 204th Street because they are not responsible for any DDT found in fill material there. Plaintiffs admit that DDT was widely used in Los Angeles County, and cannot prove that any DDT present in fill material in backyards a quarter-mile or more from the former Montrose plant originated there as opposed to elsewhere. The two sampling results relied upon by the government provide no basis for linking any DDT in reported "fill material" to the Montrose plant, and a motion is pending to bar any evidence found during the 1994 excavation because the EPA burned the excavated materials despite Montrose's repeated requests to inspect and sample it. Montrose did not produce formulated DDT at the time EPA contends the disposal occurred, and EPA has no explanation for the numerous other pesticides found in the same soils it excavated. In addition, the government's contention that Montrose is the source of the DDT found in the fill layer contradicts the testimony of 27 former Montrose employees deposed in this action who testified they had no knowledge of any disposals from the plant to 204th Street ever occurring, and that any off-specification or spilled DDT product was recycled at the Montrose plant.

Moreover, it was arbitrary and capricious and inconsistent with the NCP for EPA to excavate dirt on 204th Street because there was insufficient evidence that DDT was present at levels posing a risk to human health or the environment. EPA's removal actions also exceeded the statutory time limit of one year and expenditure cap of $2 million under CERCLA § 104(c)(1), and Defendants are not liable for such removal costs. EPA further violated the NCP by failing to perform an EE/CA or an RI/FS to determine an appropriate response at

204th Street, and by failing to compile a proper administrative record related to the 1998 removal action.

The 204th Street panic induced by the EPA's relocation of residents also led the EPA to fund an ATSDR-sponsored "health clinic" for Neighborhood residents despite its own recognition that residents were not exposed to DDT above California background levels.

d. Defendants are not liable for costs incurred by EPA to investigate potential contamination in neighborhood surface soils

(1) Defendants are not responsible for any DDT found in the neighborhood.

In an attempt to assuage neighborhood concerns, EPA has engaged in a multi-million dollar "neighborhood investigation," including: (a) a search for additional "fill material" at every location where aerial photo analysis suggested a change in elevation since 1947 — none was found; (b) a search for evidence of aerial dispersion of DDT from the Montrose plant — which showed only that the levels in the Neighborhood were less than levels in background areas and had no pattern of dispersion from the Montrose plant; and (c) a multi-phase search for DDT allegedly traveling by storm water runoff from the Montrose plant down the long-buried Kenwood Ditch — which only sporadically detected DDT above background levels and showed no pattern of runoff from the Montrose plant. In so doing, the EPA duplicated past studies and ignored its own statistician's advice on sampling to satisfy political demands from activists. Defendants have no liability for any DDT found in the Neighborhood or the EPA's costs incurred to look for it. Moreover, even if plaintiffs could prove that DDT found in the Neighborhood came from the Montrose plant, which they cannot, Defendants have no responsibility for the EPA's arbitrary and capricious decision to duplicate previous work simply to satisfy unfounded community concerns.

The sporadic nature of EPA's findings of DDT in Neighborhood surface soils establishes that aerial emissions from the Montrose plant were not the source of the DDT. Instead, the pattern is consistent with normal background levels of past DDT applications for pest control. Similarly, the DDT concentrations detected by EPA in surface water pathways

during the Neighborhood investigations could derive from local mosquito abatement districts, nurseries, farms, commercial exterminators, or household pesticide application. The government has provided no evidence eliminating these potential sources, but has instead admitted that DDT was one of the most widely used pesticides in the United States during the 1950s and 1960s.

(2) EPA cannot establish Defendants are liable under CERCLA for neighborhood sampling that was unnecessary, excessive and inconsistent with the NCP, or for costs incurred by the Agency for Toxic Substances and Disease Registry ("ATSDR")

Furthermore, Defendants are not liable for Neighborhood Sampling Program costs because the sampling program was unnecessary, excessive, and undertaken purely as a result of political pressure rather than for any scientific reason. Extensive sampling programs had already been undertaken in the neighborhoods near the Montrose plant that indicated no risk to human health, yet EPA initiated a second neighborhood sampling program costing $3.4 million, in response to political pressures, to assess whether soils had been impacted by DDT (and chemicals believed to have migrated from the Del Amo Superfund Site) through aerial dispersion, surface water transport, or use of contaminated fill material, and to collect data to assess purported human health risks from DDT in surface soils. Sampling results confirm there exists no risk to human health or the environment from the presence of any DDT in the Neighborhood. Remediation is therefore unnecessary to protect public health or the environment and it would be arbitrary, capricious and inconsistent with the NCP to require Defendants to pay for the costs of such unnecessary remedies. Defendants are not liable for costs to search for chemicals from the Del Amo Superfund Site.

Finally, Defendants are not liable for costs incurred by the ATSDR because such costs were directed toward suspected DDT found at 204th Street and the surrounding Neighborhood, for which the government cannot meet its burden of establishing Defendants' liability, and toward chemicals migrating from the Del Amo Waste Pits site, for which Defendants have no responsibility. Moreover, Defendants are not liable for costs related to the ATSDR-funded health clinic because the clinic was not authorized under CERCLA

§ 104(i) and the clinic's health study was unwarranted. To require Defendants to pay for the costs of an unnecessary study would be arbitrary, capricious and inconsistent with the NCP.

e. Defendants are not liable for the surface water drainage way beyond the Normandie Avenue ditch, and any decision by EPA to require Defendants to remediate the surface water drainage way would be arbitrary, capricious and inconsistent with the NCP

Montrose's investigation has shown that any DDT in surface water runoff did not travel beyond the Normandie Avenue Ditch. Plaintiffs cannot show that any DDT from the Montrose plant is found in the surface water drainage way beyond that point, and therefore Defendants have no liability for such areas or EPA costs incurred therein. Moreover, the EPA has not and cannot demonstrate that any significant amounts of DDT are present in the surface water drainage way. Moreover, EPA and NOAA incurred unreasonable and unnecessary costs that they are not entitled to recover from Defendants, in arbitrarily rejecting Montrose's analyses of the surface water drainage way (which showed remedial actions were unnecessary) and deciding to re-investigate this pathway in the hope of gaining a litigation advantage.

f. EPA is in violation of the Court's order regarding selection of remedy for the upland areas

(1) EPA failed to make a final determination as to remedial or removal actions, if any, for the Montrose plant site, adjacent areas, the 204th Street neighborhood, and the storm drains by August 1, 2000 as set forth in the Court's order of June 5, 2000.

5. Defendant Chris-craft Industries, Inc.'S Defenses

(1) Plaintiffs cannot meet their burden of proving Chris-Craft Industries Inc. or its corporate predecessors in interest to be liable as a current or former owner or operator of the Montrose plant site.

C. United States' Defenses To Defendants' Counterclaims

CERCLA COUNTERCLAIMS

1. The United States Is Not Liable In Contribution For EPA's

Response Costs.

A liable party may seek contribution under CERCLA only pursuant to Section 113(f). Defendants cannot assert a "cost recovery" claim under Section 107(a).

a. The Only "Facility" At Issue Is The Contaminated Area On The PVS

(1) The claimant in a contribution action under Section 113(f) must establish that the party against whom the claim is asserted is liable with regard to the "facility" at issue.

(2) The EPA response costs at issue were incurred in connection with investigation of the DDT/PCB contamination surrounding the White's Point Outfall on the Palos Verdes Shelf.

(3) The area of the Palos Verdes Shelf surrounding the White's Point Outfall is the "facility" at issue with regard to these response costs. See Third Am. Compl. at Para. 48 ("area of the Palos Verdes Shelf surrounding the White's Point Outfall"). This facility does not include the entire Southern California Bight. Nor does it include any military base or Navy shipyard.

(4) To establish that the United States is liable in contribution with regard to EPA's response cost, Defendants must show that the United States is an owner, operator, arranger, or transporter with regard to the Palos Verdes Shelf facility. See Section 107(a) of CERCLA; 42 U.S.C. § 9607(a).

b. The United States Is Not Liable An "Owner"

(1) The United States never owned the Palos Verdes Shelf. See Order Granting Partial Summary Judgment in Favor of the United States Regarding Plaintiffs' Ownership of the Palos Verdes Shelf, October 19, 1999.

(2) The United States is not liable as a past or present "owner" of the Palos Verdes Shelf. See Order Granting Partial Summary Judgment in Favor of the United States Regarding Plaintiffs' Ownership of the Palos Verdes Shelf, October 19, 1999.

c. The United States Is Not Liable As An "Operator"

(1) The United States never managed, directed, conducted operations on, controlled, or otherwise operated the Palos Verdes Shelf. The United States is not liable as an past or present "operator" of the Palos Verdes Shelf facility.

d. The United States Is Not Liable As An "Arranger"

(1) To establish that the United States is liable as an "arranger," Defendants must show that the United States arranged for hazardous substances owned or possessed by the United States to be disposed of on the Palos Verdes Shelf. Section 107(a)(3) of CERCLA, 42 U.S.C. §9607(a)(3).

(2) Defendants cannot show that the United States arranged for hazardous substances owned or possessed by the United States to be disposed of on the Palos Verdes Shelf.

(3) Defendants cannot show that hazardous substances owned or possessed by the United States contributed to the contamination on the Palos Verdes Shelf.

(4) The United States is not liable as an "arranger" with regard to the Palos Verdes Shelf facility.

e. The United States Is Not Liable As An "Transporter"

(1) Defendants cannot show that the United States transported hazardous substances for disposal on the Palos Verdes Shelf.

(2) Defendants cannot show that hazardous substances transported by the United States for disposal at other ocean locations contributed to the contamination on the Palos Verdes Shelf.

(3) The United States is not liable as an "transporter" with regard to the Palos Verdes Shelf facility.

2. The United States Is Not Liable In Contribution For Natural Resource Damages

a. To succeed on their claims against the United States with regard to natural resource damages, Defendants must establish all of the elements of liability under

Section 107(a). As discussed above, defendants cannot make this showing.

b. Additionally, to obtain contribution relating to natural resource damages, Defendants must also show that hazardous substances released by the United States resulted in an injury to the natural resources for which the Defendants have been held responsible.

c. If DDT released from the Montrose plant was the sole cause of the injury to the natural resources, Defendants' counterclaims must be dismissed with regard to natural resource damages.

d. If Defendants' DDT was not the sole cause of the natural resource damages but was a "substantially contributing cause," then Defendants must demonstrate that a hazardous substance released by the United States was also a "substantially contributing cause" of the natural resource damages for which Defendants are liable.

e. Defendants cannot show that hazardous substances released by the United States contributed substantially to any natural resource damages for which Defendants are liable.

f. Point Mugu Naval Air Weapons Station, the Naval Complex at Long Beach, and other military bases and shipyards are not "facilities" at issue in this litigation. The release of hazardous substances from military bases or shipyards is immaterial to the counterclaims unless such substances came to be located in an areas at issue in this litigation.

g. Defendants cannot show that any hazardous substance released by the United States came to be located in an area at issue in this case.

h. The United States never owned, possessed, operated, or controlled the Montrose Chemical plant.

i. The United States never owned, possessed, operated, or controlled the sewer system connecting the Montrose Chemical plant to the White's Point Outfall.

j. The United States never owned, possessed, operated, or

controlled White's Point Outfall.

3. Defendants Should Bear All Costs and Damages

a. Because the United States is not liable on the CERCLA counterclaims, allocation issues need not be addressed.

b. If allocation is addressed, among the equitable factors frequently considered in allocating costs among liable parties are volume, toxicity, actual involvement in waste generation, and degree of care. See Boeing Co. v. Cascade Corp., 207 F.3d 1177, 1187 (9th Cir. 2000) .

c. One of several liable parties may be allocated 100% of remediation costs if this outcome is appropriate in view of the totality of the circumstances. Correspondingly, a liable party should not be required to bear any of the remediation costs where circumstances make this outcome equitable. Pinal Creek Group v. Newmont Mining Corp., 118 F.3d 1298, 1301 (9th Cir. 1997).

d. Montrose knowingly released massive amounts of DDT to the Palos Verdes Shelf over several decades and these releases caused extensive environmental damage and large EPA costs. Defendants cannot show that hazardous substance released by the United States contributed in any significant way to the costs or damages at issue in the counterclaims. Consequently, there is no equitable basis for shifting any of the Defendants' financial liability to the United States.

NON-CERCLA COUNTERCLAIMS

1. No conduct on the part of the United States for which the negligence alleged attaches.

a. Counterclaims as to which the defense is asserted:

All remaining tort counterclaims.

b. Ultimate facts required to prove the defense:

Defendants' Memorandum of Contentions of Law and Findings of Fact (Aug. 7, 2000), Findings of Fact at p. 26, line 21 through p. 28, line 20, 9; James Anderson, Executive of Officer of the Santa Ana Regional Water Quality Control Board; Steven

Dwyer, Fed. R. Civ. P. 30(b)(6) designee for the Corps of Engineers; Kate Faulkner, Channel Islands National Park: Steven Eikenberry and Vivian Goo, Fed. R. Civ. P. 30(b)(6) designees for the Naval Facilities Engineering Command Center, and Point Mugu Naval Air Station, respectively; a permit issued by the State of California to the to LACSD for the construction of the White's Point Outfall. The sole tort allegations set forth in Defendants' Finding of Fact relate to the state "or" federal regulators' purported negligent failure to regulate LACSD which Defendants claim caused injury to the Palos Verde Shelf. Even if these allegations do state a cause of action against plaintiffs, the State of California regulated LACSD's construction and use of the White's Point Outfall. The United States played no regulatory role.

2. It is law of the case that the United States has not waived sovereign immunity for claims asserting tort liability for which there is no analogous private liability. United States v. Montrose, 788 F. Supp. 1485, 1491 (C.D. 1992) (dismissing dangerous condition of public property counts against the United States); Bush v. Eagle- Picher, 927 F. 2d 445, 452 (9th Cir. 1991). It is also law of the case that, to the extent that the United States exercises "control " over the Palos Verde Shelf, it is doing so exclusively in its sovereign capacity. Oct. 19, 1999 Minute Order, at ¶ 8.

a. Counterclaims as to which the defense is asserted:

All remaining tort counterclaims.

b. Ultimate facts required to prove the defense:

Defendants' Memorandum of Contentions of Law and Findings of Fact (Aug. 7, 2000), Findings of Fact at p. 26, line 21 through p. 28, line 20, 9; Steven Eikenberry and Vivian Goo, Fed. R. Civ. P. 30(b)(6) designees for the Naval Facilities Engineering Center; Steven Granade, Fed. R. Civ. P. 30(b)(6) designee for the Point Mugu Naval Air Station; Kate Faulkner, Channel Islands National Park; Steven Dwyer, Fed. R. Civ. P. 30(b)(6) designee for the Corps of Engineers. The tort allegations set forth in Defendants' Finding of Fact relate to the State "or " federal regulators purported negligent failure to regulate LACSD. . These activities are exclusively governmental, and thus, there is no analogous

private liability for which the United States may be held liable in tort.

3. The United States is not liable because of the discretionary function exception to the Federal Tort Claims Act , 28 U.S. C. § 2680(a); United States v. S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797, 819-820, 104 S. Ct. 2755, 81 L. Ed. 2d 660 (1984) In re Consolidated U. S. Atmospheric Testing, 820 F.2d 982, (9th Cir. 1987), cert. denied sub. nom. Konizeski v. United States, 485 U.S. 905, 108 S. Ct. 1076, 99 L. Ed. 2d 235 (1988).

a. Counterclaims as to which the defense is asserted:

All remaining tort counterclaims.

b. Ultimate facts required to prove the defense:

Defendants' Memorandum of Contentions of Law and Findings of Fact (Aug. 7, 2000), Findings of Fact at p. 26, line 21 through p. 28, line 20. 9; Steven Eikenberry, Vivian Goo, Fed. R. Civ. P. 30(b)(6) designees for the Naval Facilities Engineering Center; Steven Granade, Fed. R. Civ. P. 30(b)(6) designee for Point Mugu Naval Air Station; Kate Faulkner, Channel Islands National Park; Steven Dwyer, Fed. R. Civ. P. 30(b)(6) designee for the Corps of Engineers. Even if the United States had regulatory authority over LACSD – which it did not– the United States' conduct is protected by the discretionary function exception. Additionally, even if the military did contribute to the contamination of the Palos Verde Shelf, such conduct was protected by the discretionary function exception as the conduct in question was within the discretion of federal employees and was based on, or susceptible of being based on, policy considerations of the type that Congress intended to shied from judicial scrutiny.

4. Claims For CERCLA Contribution Are Limited To Section 113(f) of CERCLA.

a. Counterclaims as to which the defense is asserted:

All remaining tort counterclaims.

b. Ultimate facts required to prove the defense:

Defendants' Memorandum of Contentions of Law and Findings of Fact (Aug. 7,

2000), Findings of Fact at p. 26, line 21 through p. 28, line 20, 9. It is law of the case that claims for contribution for CERCLA liability may only be brought pursuant to 42 U.S.C. § 9613(f). Order, June 21, 2000. The June 21, 2000, Order resulted from the United States' Motion to Dismiss pursuant to Fed. Rule Civ. Pro. 12(b)(1) all of the Tort Counterclaims because the United States argued that all of Defendants' claims were, in fact, claims for contribution. The Court dismissed only those claims that it believed stated claims for contribution. Defendants' proposed Findings of Fact now establish that the liability they seek is exclusively in contribution. Accordingly, recovery in tort is barred.

D. STATE OF CALIFORNIA'S DEFENSES TO DEFENDANTS' COUNTERCLAIMS

Counterdefendant State of California's Affirmative Defenses to Counterclaims Asserted by Counterclaimants Montrose Chemical Company of California, Chris-craft Industries, Inc., Atkemix Thirty-seven, Inc. and Aventis Cropscience USA, Inc.

1. "Emergency Response" Exception (42 U.S.C. § 9607(d)(2))

a. Counterclaims as to which the defense is asserted.

Counterclaimants' claims under CERCLA, 42 U.S.C. §§ 9607 and 9613(f).

b. Ultimate facts required to prove the defense.

The discharge of wastewater by the State from the Stringfellow site into the LACSD sewer system in 1978 and 1980 was in response to an emergency created by the release or threatened release of hazardous substances from the site.

The State was not the owner of the Stringfellow site at the time of the discharges.

c. Evidence relied upon to prove the defense.

At the time of the discharges, the ponds at the site were on the verge of overflowing because of heavy rains. If the ponds had overflowed, the water in the ponds (which contained hazardous substances) would have flooded the neighboring residential areas, and hazardous substances would have entered the groundwater downstream of the site. Pumping the ponds and discharging the water into the sewer was a reasonable response to this

emergency. James Anderson, Executive Officer of the Santa Ana Regional Water Quality Control Board at the time, will testify as to these matters.

At the time of the discharges, the Stringfellow Quarry Company was the owner of the Stringfellow site. Mr. Anderson will testify as to this matter.

2. Cal. Govt. Code § 818.2 Immunity (Immunity from Liability for Failure to Adopt or Enforce Enactment)

a. Counterclaims as to which the defense is asserted.

All state-law counterclaims other than breach of mandatory duty (Cal. Govt. Code § 815.6).

b. Ultimate facts required to prove the defense.

Counterclaimants' claims are based upon the State's alleged failure to prevent Los Angeles County Sanitation Districts from discharging hazardous substances into the ocean through the White's Point outfall.

c. Evidence relied upon to prove the defense.

Counterclaimants dumped tons of DDT into the sewer system operated by LACSD. A substantial portion of that DDT was not removed by treatment at the LACSD plant and was discharged into the Pacific Ocean through the White's Point outfall. Admissions by Counterclaimants, measurements of DDT in the effluent of the Montrose plant by LACSD, and testimony by an LACSD engineer regarding the efficiency of primary treatment demonstrate these facts.

The State did not enact more stringent laws requiring pre-treatment of wastes, by dischargers, greater treatment of wastes by LACSD, or prohibiting sewer discharges into the ocean.

The State did not earlier bring action against Counterclaimants or LACSD to enforce existing laws prohibiting discharges into the sewer or the ocean of substances which are deleterious to fish or birds.

3. Cal. Govt. Code § 818.4 Immunity (Immunity from Liability for Issuance of a Permit or Failure to Revoke a Permit).

a. Counterclaims as to which the defense is asserted.

All state-law counterclaims other than breach of mandatory duty (Cal. Govt. Code § 815.6).

b. Ultimate facts required to prove the defense.

Counterclaimants' claims are based upon permits issued by the State to LACSD.

c. Evidence relied upon to prove the defense.

The State issued a permit to LACSD to construct and operate the White's Point outfall, and two permits to expand the outfall.

The State did not revoke any of the permits.

4. Cal. Govt Code § 831.6 Immunity (Immunity from Liability Based upon the Condition of Submerged Lands).

a. Counterclaims as to which the defense is asserted.

Dangerous condition of public property.

Nuisance.

b. Ultimate facts required to prove the defense.

Counterclaimants' claims for nuisance and dangerous condition of public property are based upon the condition of submerged lands.

The State is the "owner" of submerged lands within the meaning of Government Code § 831.6.

c. Evidence relied upon to prove the defense.

DDT exists in large amounts in the sediments on the ocean floor in the Southern California Bight within three miles of the California coast. Measurements by LACSD and Counterclaimants' experts confirm this fact.

5. Governmental Function Immunity (Aubry V. Tri-city Hospital District)

a. Counterclaims as to which the defense is asserted.

All state-law counterclaims.

b. Ultimate facts required to prove the defense.

All of Counterclaimants' state-law claims are based upon actions or omissions by the State in its governmental capacity.

c. Evidence relied upon to prove the defense.

The State issued a permit to LACSD to construct and operate the White's Point outfall, and two permits to expand the outfall.

The State did not revoke any of the permits.

Counterclaimants dumped tons of DDT into the sewer system operated by LACSD. A substantial portion of that DDT was not removed by treatment at the LACSD plant and was discharged into the Pacific Ocean through the White's Point outfall. Admissions by Counterclaimants, measurements of DDT in the effluent of the Montrose plant by LACSD, and testimony by an LACSD engineer regarding the efficiency of primary treatment demonstrate these facts.

The State did not enact more stringent laws requiring pre-treatment of wastes, by dischargers, greater treatment of wastes by LACSD, or prohibiting sewer discharges into the ocean.

The State did not earlier bring action against Counterclaimants or LACSD to enforce existing laws prohibiting discharges into the sewer or the ocean of substances which are deleterious to fish or birds.

6. Unclean Hands.

a. Counterclaims as to which the defense is asserted.

All state-law counterclaims.

b. Ultimate facts required to prove the defense.

Counterclaimants engaged in improper conduct directly related to the circumstances under which their state-law counterclaims against the State are based.

c. Evidence relied upon to prove the defense.

Counterclaimants dumped tons of DDT into the sewer system operated by LACSD. A substantial portion of that DDT was not removed by treatment at the LACSD plant and was discharged into the Pacific Ocean through the White's Point outfall. Admissions by

Counterclaimants, measurements of DDT in the effluent of the Montrose plant by LACSD, and testimony by an LACSD engineer regarding the efficiency of primary treatment demonstrate these facts.

Counterclaimants' actions in dumping DDT into the sewer were in violation of their waste discharge permits from local government authorities. Those permits prohibited the discharge of any hydrocarbons and any toxics into the sewer.

Counterclaimants' actions in dumping DDT into the sewer were in violation of California law, including but not limited to Cal. Stats. 1933, Ch. 73 § 481 and Cal. Stats. 1956 § 5650(f).

Counterclaimants did not disclose to the State that they were dumping DDT into the sewer. Their reports and applications for discharge permits never stated that their discharges to the sewer contained DDT.

7. Assumption of the Risk.

a. Counterclaims as to which the defense is asserted.

Negligence.

Negligence per se.

Dangerous condition of public property.

b. Ultimate facts required to prove the defense.

By intentionally dumping DDT into the sewer system, Countclaimants assumed the risk that they would be held civilly liable for such actions.

c. Evidence relied upon to prove the defense.

Counterclaimants dumped tons of DDT into the sewer system operated by LACSD. A substantial portion of that DDT was not removed by treatment at the LACSD plant and was discharged into the Pacific Ocean through the White's Point outfall. Admissions by Counterclaimants, measurements of DDT in the effluent of the Montrose plant by LACSD, and testimony by an LACSD engineer regarding the efficiency of primary treatment demonstrate these facts.

Counterclaimants' actions in dumping DDT into the sewer were in violation of their

waste discharge permits from local government authorities. Those permits prohibited the discharge of any hydrocarbons and any toxics into the sewer.

Counterclaimants' actions in dumping DDT into the sewer were in violation of California law, including but not limited to Cal. Stats. 1933, Ch. 73 § 481 and Cal. Stats. 1956 § 5650(f).

ADDITIONAL EVIDENCE RELIED UPON BY THE STATE OF CALIFORNIA TO DEFEAT COUNTERCLAIMANTS' CLAIMS

1. CERCLA Counterclaims (Arranger Liability).

The State incorporates all of the evidence relied upon in support of its affirmative defenses. In addition, the State relies upon the following evidence. Measurements by EPA and LACSD established that the total amount of DDT which the State deposited in the sewer did not exceed 11 pounds. Virtually all of this was deposited in a sewer in Fontana, more than 50 miles from the LACSD plant. (James Anderson testimony.) It is unlikely that any of this DDT actually traversed the 50 miles to the LACSD plant. In 1978, LACSD's measurements show that primary treatment by LACSD eliminated more than 50% of all suspended solids in wastewater, and, in 1980, primary treatment by LACSD eliminated more than 60% of all suspended solids in wastewater. By contrast, Montrose's Vice President and plant superintendent, Max Sobelman, admitted that Montrose discharged a minimum of 25 tons of DDT into the sewer, and LACSD measurements indicate that, in fact, Montrose discharged more than 1,000 tons of DDT into the sewer.

2. State law counterclaims.

The State incorporates all of the evidence relied upon in support of its affirmative defenses. In addition, the State relies upon the following evidence.

The Los Angeles Regional Water Quality Control Board and its predecessor (the "Board") required LACSD to sample and measure contaminants in all effluent from the LACSD plant. When the Board determined that there was an unacceptable level of contamination in the effluent, it would require LACSD to take action to eliminate the contamination. These facts are established by various resolutions of the Board, as well as

testimony of officers of the Board.

The Board was not aware that there was DDT in the effluent from LACSD. Until the late 1960's, it was difficult to detect DDT in wastewater and DDT was not generally regarded as a matter of concern to urban sewer districts. Neither the Board nor LACSD knew that Montrose was discharging DDT into the sewer (because Montrose was concealing that fact). As soon as the Board discovered that Montrose was discharging massive amounts of DDT into the sewer, it immediately instructed LACSD to eliminate Montrose's DDT discharges into the sewer. These facts are established by the testimony of Board officers and contemporaneous scientific literature.

VIII. DISCOVERY

All discovery is complete, with the following exceptions:

1. Plaintiffs motion to compel discovery re: Defendants expert and attorney fees (pending before the Special Master).

2. The United States is continuing to search agencies other than the EPA for documents, including e-mails, responsive to Montrose's document requests. Montrose reserves the right to move to compel on such requests if the documents are not produced shortly and to seek depositions of any persons revealed by such documents whose existence or importance was not previously known.

3. Defendants are contemplating seeking the deposition of Charles Fox, whose existence and importance were only recently revealed by the United States' late production of e-mail correspondence involving Mr. Fox.

IX. EXHIBIT LISTS

The joint exhibit list of the parties has been filed herewith under separate cover as required by Local Rule 9.7. The parties have to agreed to, and the Special Master has approved, the following schedule for objections. All parties shall file and serve any objections to exhibits on or before September 5, 2000. Thereafter, all exhibits may be admitted without objection, except those objected to by September 5, 2000.

X. WITNESS LISTS

Witness lists of the parties have heretofore been filed with the Court.

XI. DEPOSITION DESIGNATIONS

The parties are marking deposition testimony in accordance with Local Rule 9.4.9. At the pretrial meeting of counsel with the Special Master, the Parties agreed to lodge the final depositions on September 19, 2000.

XII. MOTIONS

The following law and motion matters and motions in limine are pending or contemplated.

A. By Plaintiffs

Pending

1. A motion to compel Defendants to state the amount of costs incurred in litigating this case and for experts is pending before the Special Master.

Contemplated

1. Motion to admit F..R.E. 1006 summaries for voluminous scientific data

2. Motion to admit F..R.E. 1006 summaries for voluminous cost documentation

3. Motion for permission to use deposition testimony in lieu of live testimony for certain witnesses.

4. Motions to strike certain experts, including testimony and all related exhibits, based on, among other things, relevance and Daubert standards lack of competence and foundation and hearsay. Such motions will not be filed until after Plaintiffs receive the Defendants' direct testimony affidavits (on August 22, 2000). Plaintiffs may file, inter alia, motions to exclude all or portions of the testimony of the following: Inman, Spaulding, Knezovich, Davis, Hansen, Love, Ball, Giesy, Jensen, Weaver, Chicetti, Payne

5. Motions to strike certain fact witnesses, including testimony and all related exhibits, because the defendants will improperly call them to provide expert opinions, in contravention of F.R.E. 701 and this Court's February 14 2000 scheduling order lack of

competence and foundation, relevance and hearsay. Such motions will not be filed until after Plaintiffs receive the Defendants' direct testimony affidavits (on August 22, 2000). Plaintiffs may file, inter alia, motions to exclude all or portions of the testimony of the following: Bachman, Weaver, Hargis.

6. Plaintiffs intend to submit objections to the Defendants exhibits, and the deposition testimony designated by the Defendants, as contemplated in this Order.

7. Motion to exclude defendants from using evidence created by or relating to experts that they have moved to strike.

8. Motion to strike Defendants designation as a trial witness of "Any other person".

9. Motion to defer or stay consideration of costs incurred with respect to certain contractors that are under investigation.

10. Motion for summary Judgment for (1) liability of Defendants for releases of hazardous substances to the Pacific Ocean.

11. Motion for summary judgment that natural resources have been "injured" as a matter of law.

B. By Defendants

Pending

1. Motion for Summary Judgment on Count I and Portions of Count II Relating to the Palos Verdes Shelf.

2. Motion to exclude spoliated evidence

Contemplated

1. Motion to recover costs and attorney fees relating to sanctions motion;

2. Motion in limine to exclude recovery of Department of Justice response costs;

3. Motion re: EPA deadlines in Court's June 5, 2000 order;

4. Motion in limine to exclude irrelevant and redundant evidence;

5. Motion in limine to bar plaintiffs from calling defense counsel as trial witnesses;

6. Motion to require disclosure of who is Trustee for which natural resource;

7. Motion for partial summary judgment on claim for response costs relating to 204th Street;

8. Motion for partial summary judgment on claim for "neighborhood investigation" response costs;

9. Motion for partial summary judgment on claim for Dominguez Channel and Consolidated Slip response costs;

10. Motion to strike testimony of witnesses not disclosed on witness list;

11. Motion to strike all or a portion of the testimony of various of Plaintiffs' expert witnesses on such grounds as: failure to satisfy Daubert; testimony that goes beyond the scope of the written expert reports; lack of competence and foundation; hearsay; relevance; and materiality. The expert witnesses as to whom such motions will be filed include the following: Ambrose, Bailey, Calambokidis, Connolly, Costa, Edwards, Eganhouse, Garcelon, Gress, Hamer, Hampton, Hunt, Josselyn, Kayen, Kiff, Lee, Murray, Noble, Wade, Walton, Wheatcroft, Wiberg, and Wright.

12. Motion to strike all or a portion of the testimony of various of the government's fact witnesses, on such grounds as: inadmissible opinion testimony from a fact witness; hearsay; lack of competence and foundation; relevance; and materiality. The fact witnesses as to whom such motions will be filed include the following: Ackerman, Baird, Bruffy, Chan, Chartrand, Conner, Conti, Dhont, Faulkner, Fisher, Fong, Freeman, Helm, Johnson, Jones, Jurek, Kim, Kushner, Mack, Mahan, Martin, Mesta, McQuillan, Nelson, O'Rourke, Pang, Redner, Schauffler, Simanonok, Steel, Stull, Tang, Winchell, C. Young, D. Young.

C. By Counterdefendant State of California

Pending

1. Motion For Partial Summary Judgment On Grounds of Proximate Cause With Respect To Counterclaims For Negligence, Negligence *Per Se*, Public Nuisance, Dangerous Condition of Public Property, And Breach of Mandatory Duties, Dangerous Condition of Public Property And Breach of Mandatory Duties

2. Motion For Partial Summary Judgment Re: Breach of Mandatory Duty

3. Motion For Partial Summary Judgment Re: Arranger Liability For Natural Resource Damages;

4. Motion For Partial Summary Judgment Re: The Atkemix Parties' Counterclaim For Dangerous Condition Of Public Property.

Contemplated

1. Motion for Partial Summary Judgment Re: Governmental Functions;

2. Motion for Partial Summary Judgment Re: Allocation;

3. Motion for Partial Summary Judgment Re: Submerged Lands Immunity;

4. Motion in Limine to Exclude Testimony of Dr. Malcolm Spaulding;

5. Motion in Limine to Exclude Testimony of Dr. Robert Weaver;

6. Motion in Limine to Exclude Testimony of Dr. Douglas Inman;

7. Motion in Limine to Exclude Evidence of Offshore Releases of Substances Other Than DDT;

8. Motion in Limine to Exclude Evidence of State Regulation of Any Substance Other Than DDT;

9. Motion in Limine to Exclude Evidence of State Purchases of DDT.

10. Motion for partial summary judgment re: breach of trust.

D. By Counterdefendant United States

1. Motion for summary judgment re the CERCLA Counterclaims Against The United States

2. Motion to exclude evidence re factual contentions not identified in Defendants contentions of fact and law.

XIII. BIFURCATION

A. Governments' Position Re: Order Of Presentation Of Evidence At Trial

Plaintiffs do not seek bifurcation.

However, by their very nature, Defendants counterclaims are contingent on the Court's resolution of the affirmative claims. The counterclaims also involve numerous factual issues

(and associated witnesses and exhibits) distinct from the issues involved in the affirmative claims. While certain evidence relevant to the affirmative claims will also be relevant to the counterclaims, there will be many witnesses and exhibits relevant only to the counterclaims.

Under these circumstances, a distinct phase of the trial should be designated for presentation of evidence relevant only to the counterclaims. This should come at the end of the trial, after all evidence relevant to the affirmative claims has been presented.

Further, because Defendants bear the burden of going forward with regard to the counterclaims (i.e., Defendants are in essence the "plaintiffs" on the counterclaims), during the counterclaim segment of the trial Defendants should present evidence first. Following completion of Defendants' case in chief on the counterclaims, the United States would then present evidence on its defenses and in rebuttal. Only in this way will the United States have the opportunity to hear Defendants' evidence regarding the counterclaims before being required to respond to that evidence.

Thus, the United States requests that the Court order that (i) the counterclaims will be heard after the affirmative claims, and (ii) Defendants bear the burden of going forward on the counterclaims during this final phase of the trial.

B. Chris-Craft's Position On Bifurcation Of Liability Claim Against It

Defendant Chris-Craft, for itself alone, submits that the liability issues against it could be severed from the trial. Because these are secondary liability issues, there is no need to try them as part of the case in chief. They only need be addressed, if at all, if there is an adverse judgment against Montrose such that, following offset by its counterclaims, it cannot satisfy. Eliminating this issue from the upcoming trial will save days of trial time and eliminate hundreds of exhibits.

XIV. CONCLUSION

The foregoing admissions having been made by the parties, and the parties having specified the foregoing issues of fact and law remaining to be litigated, this pretrial

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conference order shall supersede the pleadings and govern the course of the trial of this cause, unless modified to prevent manifest injustice.

Dated: Aug. 28, 2000.

HONORABLE MANUEL REAL
UNITED STATES DISTRICT JUDGE

Respectfully submitted,

By Plaintiff State of California:

BILL LOCKYER
Attorney General of the State of California
J. MATTHEW RODRIQUEZ
Assistant Attorney General

Dated: August 21, 2000 by:

JOHN A. SAURENMAN
Deputy Attorney General
Attorneys for State of California, et al.

By Plaintiff United States:

LOIS SCHIFFER
Assistant Attorney General
Environment & Natural Resources Division
United States Department of Justice

Dated: August 21, 2000 by: Steven O'Rourke by

STEVEN O'ROURKE
Environmental Enforcement Section
Environment & Natural Resources Division

MICHAEL SEMLER
Environmental Defense Section
Environment & Natural Resources Division

STEVEN TALSON
Environmental Torts
Civil Division

United States Department of Justice
Attorneys for the United States

By Defendants Atkemix Thirty-Seven, Inc, and Aventis CropScience USA, Inc.:

Dated: August 21, 2000

Paul B. Galvani by HHJ
PAUL B. GALVANI
ROPES & GRAY
Attorney for Defendants Atkemix Thirty-Seven, Inc, and Aventis CropScience USA, Inc.

By Defendant Montrose Chemical Corporation of California:

Dated: August 21, 2000

Karl S. Lytz by HHJ
KARL S. LYTZ
LATHAM & WATKINS
Attorneys for Defendant Montrose Chemical Corporation of California,

By Defendant Chris-Craft Industries, Inc.:

Dated: August 21, 2000

Peter Simshauser by HHJ
PETER SIMSHAUSER
SKADDEN, ARPS, SLATE, MEAGHER & FLOM
Attorney for Defendant Chris-Craft Industries, Inc.

DECLARATION OF SERVICE BY MAIL

Re: UNITED STATES and STATE OF CALIFORNIA v. MONTROSE CHEMICAL CORPORATION OF CALIFORNIA, et al., U.S.D.C., C.D. CAL. No. CV 90-3122-R

I, John A. Saurenman, declare that I am over 18 years of age, and not a party to the within cause; my business address is 300 South Spring Street, Los Angeles, California 90013; I served a copy of the attached

[PROPOSED] PRE-TRIAL ORDER

on each of the following, by placing same in an envelope(s) addressed as follows:

PETER SIMSHAUSER
SKADDEN, ARPS, SLATE, MEAGHER & FLOM
300 South Grand Ave., Suite 3400
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Each said envelope was then, on August 21, 2000, sealed and deposited in United States Mail with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct, and is executed on August 21, 2000, at Los Angeles, California.

Declarant